The Administrative Dispute Resolution Act of 1996: Will the New Era of ADR in Federal Administrative Agencies Occur at the Expense of Public Accountability?

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"No man is good enough to govern another man without that other's consent."

-Abraham Lincoln[1]

I. INTRODUCTION

On October 19, 1996, President Clinton signed into law the Administrative Dispute Resolution Act of 1996.[2] The Act provided for permanent reauthorization of the Administrative Dispute Resolution Act of 1990,[3] which sunset on October 1, 1995[4] pursuant to its original enactment period of six years.[5] Senator Carl Levin, sponsor of the bill, lauded the new Act as a further way for agencies to "listen, find creative solutions and avoid the sometimes unnecessary big bills and bad blood that come with courtroom battles," and to "[save] both time and money and [increase] citizen satisfaction with government."[6] Given the tremendous proliferation of federal cases in which the government is a party, reauthorization of the ADR Act is certainly a welcome continuation of ADR in an area in need of more expedient adjudication methods.[7]

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[1] THE NEW WEBSTER QUOTATION DICTIONARY 121 (Donald O. Bolander ed., 1987).

[2] Pub. L. No. 104-320, 110 Stat. 3870 (1996).

[3] Pub. L. No. 101-552, 104 Stat. 2736 (codified as amended at 5 U.S.C. §§ 571-583 (1990)).

[4] *See ADR Act Sunsets*, 14 ALTERNATIVES TO THE HIGH COST OF LITIG. 5 (1996).

[5] Pub. L. No. 101-552, § 11, 104 Stat. 2736, 2747-2748 (1990).

[6] *Clinton Signs Levin's Bill Encouraging Government Innovation*, CONG. PRESS RELEASES, Oct. 21, 1996, at 1.

[7] In 1990, 25% of all federal civil cases involved the government. *See Favoring ADR, Bush Sets Rules to Stem Suits by U.S. Agencies*, 10 ALTERNATIVES TO THE HIGH COST OF LITIG. 2 (1992). The caseload faced by administrative agencies constitutes a significant amount of this burden. *See* Jeffrey S. Lubbers, *Federal Agency*

While maintaining many of the same provisions of the 1990 Act, the new law enacts two major changes designed to further agency use of ADR in suits with private parties.[8] Section 8 permits the use of binding arbitration, removing the thirty-day "opt-out" provision in the 1990 Act, which allowed agencies to unilaterally vacate an arbitration award if the agency found the arbitrator's decision to be disadvantageous to the government.[9] Section 3 broadens the confidentiality of ADR proceedings by exempting any dispute resolution communication between a party and a neutral from the disclosure requirements of the Freedom of Information Act (FOIA).[10] Together, these provisions greatly enhance the incentives for parties involved in agency adjudications to utilize ADR.

This Note asserts that although each of the new provisions of the 1996 Act should attain their intended effect of increasing the use of ADR in agency adjudications, this progress is likely to occur at the expense of public accountability. The use of binding arbitration will result in private arbitrators adjudicating public policy issues, a result which, albeit constitutional,[11] raises serious questions regarding the ability of a private arbitrator to properly make such determinations in accord with our nation's basic values.[12] Additionally, the exemption of all ADR communications between the neutral and the parties conflicts with the purpose and intent of FOIA to provide public disclosure of all government documents except as

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Adjudications: Trying to See the Forest and the Trees, 31 FED. B. NEWS J. 383, 384 (1984).

[8] In addition to the two major changes considered in this Note, the 1996 Act also makes a number of other refinements including clarifying the authority of agencies to hire neutrals on an expedited basis, allowing agencies to accept donated services from state, local and tribal governments to support an ADR proceeding, adding explicit authorization for appropriations, removing a ban on Federal employees electing to use ADR methods to resolve certain personnel disputes, eliminating special paperwork burdens on contractors willing to use ADR to resolve small claims against the government under the Contract Disputes Act and removing oversight authority previously vested in the Administrative Conference of the United States, which has since been terminated. The Act also permanently reauthorizes federal agency use of negotiated rulemaking. *See* 142 CONG. REC. S11849 (daily ed. Sept. 30, 1996).

[9] *See* Pub. L. No. 101-552, § 590(c), 104 Stat. 2736, 2743-2744 (1990) (current version at 5 U.S.C. § 580 (Supp. II 1996)).

[10] *See* 5 U.S.C. § 574(j) (Supp. II 1996).

[11] *See infra* notes 27-28 and accompanying text.

[12] *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

specifically provided in nine exemptions to FOIA.[13] While these changes will undoubtedly lead to a new era of ADR use in the federal government, this Note posits that the 1996 Act may have gone too far due to its potentially devastating effects on public accountability.

Section II of this Note presents a brief overview of past use of ADR in federal agencies, including its use and limitations under the 1990 Act. Section III explores the effect that the binding arbitration provision will have on agency use of ADR and demonstrates that, despite the Act's attempt to exempt public policy issues from the purview of the arbitrator, such issues will inevitably be decided by private neutrals with undesirable results. Section IV focuses on the new FOIA exemption by examining recent FOIA cases which exemplify the willingness of courts to include ADR communications within FOIA's disclosure exemptions, thus rendering the new Act's FOIA exemption superfluous and susceptible to abuse.

II. THE USE OF ADR IN FEDERAL AGENCIES TO DATE

The use of ADR methods in agency adjudications commenced even before the 1990 Act. Numerous agencies subscribed to the ADR movement of the 1980s by experimenting with ADR programs such as nonbinding arbitration, mediation, mini-trials and negotiated rulemaking.[14] Success stories include the Federal Deposit Insurance Corporation (FDIC), which used ADR techniques to solve disputes regarding creditors, valuation and liability,[15] as well as the Army Corps of Engineers, which used mini-trials to settle various contract claims.[16]

The 1990 Act resulted in further use of ADR in agency adjudications. Mediation became especially prevalent in the 1990s, particularly in equal employment opportunity claims against the federal government. The use of mediation by the Air Force Civilian Appellate Review Agency resulted in the settlement of more than half of its equal employment opportunity

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[13] *See* 5 U.S.C. § 552(b)(1)-(9) (1994).

[14] *See* Phillip J. Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393, 1395-1403 (1983).

[15] *See* Cathy A. Costantino, *FDIC Uses Spectrum of ADR Options to Resolve Disputes*, 39 FED. B. NEWS & J. 524, 525 (1992).

[16] *See* Lester Edelman & Frank Carr, *The Mini-Trial: An Alternative Dispute Resolution Procedure*, ARB. J., Mar. 1987, at 14.

complaints.[17] The Federal Aviation Administration also implemented mediation for use in equal employment opportunity claims.[18] Nonbinding arbitration was also utilized by several agencies, particularly in environmental disputes[19] and in claims faced by the Army Corps of Engineers.[20] These and other success stories[21] convinced Congress as well as the Bush and Clinton administrations that permanent statutory reauthorization of ADR mechanisms was essential to the ongoing effort to streamline government.[22]

Despite these achievements, however, there were several perceived shortcomings in the 1990 Act that limited the use of ADR in agency adjudications. The biggest impediment was the nonbinding arbitration clause, which granted agencies thirty days to vacate an arbitrator's decision. This "trap door" provision of the 1990 Act was inserted during the hearing stage in order to allay concerns that the establishment of a binding arbitration award by a private party would raise constitutional issues over the adjudication of public disputes by unelected, unappointed private arbitrators.[23] Under the Bush Administration in 1989, the Department of Justice (DOJ) opined that binding arbitration of agency

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[17] *See* Eileen Barkas Hoffman & John A. Wagner, *Courtbusters*, GOV'T EXECUTIVE, Oct. 1993, at 12.

[18] *See Eye on EEO*, 2 ADR NETWORK (Interagency ADR Working Groups sponsored by ACUS, Washington, D.C.), June 1994, at 3.

[19] *See* David Singer, *The Use of ADR Methods in Environmental Disputes*, ARB. J., Mar. 1992, at 55.

[20] *See* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, IMPLEMENTING THE ADR ACT: GUIDANCE FOR AGENCY DISPUTE RESOLUTION SPECIALISTS 7 (1992).

[21] Other agencies making pervasive use of ADR under the 1990 Act included the Department of the Navy through its ombudsman program for EEO disputes, and the Nuclear Regulatory Commission's use of negotiated rulemaking and mediation. *See The Use of Alternative Dispute Resolution by Federal Agencies: Hearings on S. 1224 Before the Subcommittee on Oversight of Government Management and the District of Columbia of the Senate Committee on Governmental Affairs*, 104th Cong. 152–162, 190–192 (1995).

[22] Both President Bush and President Clinton have issued executive orders indicating strong support for the use of ADR in federal government. *See* Exec. Order No. 12,988, 61 Fed. Reg. 4729 (1996); Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991).

[23] *See The Use of Alternative Dispute Resolution by Federal Agencies: Hearings on S. 971 Before the Subcommittee on Oversight of Government Management and the District of Columbia of the Senate Committee on Governmental Affairs*, 100th Cong. 20–21 (1989).

disputes potentially violated the Constitution in several ways.[24] First, binding arbitration violated Article II under the Appointment Clause, because arbitrators often are not federal employees, and thus are not authorized to make such policy determinations. Moreover, binding arbitration was thought to violate separation of powers, since the Act in effect permitted Congress to legislate the use of private parties in potentially executive roles.[25] DOJ also found binding arbitration to be contrary to Article III in that adjudicative powers were conveyed to persons outside the judicial branch. Finally, DOJ indicated a potential due process problem because of the higher due process protection generally accorded private parties subject to a federal suit brought by the federal government.[26]

In 1995, however, DOJ changed its position concerning the constitutionality of binding arbitration of agency disputes.[27] In its revised opinion, the Department reasoned that binding arbitration by private parties is permissible as long as the parties consent, the arbitration agreement sufficiently details the nature of the remedies available to the arbitrator and preserves the review of constitutional issues and an Article III court is accorded review of the arbitrator's findings for fraud, misconduct or misrepresentation. This saving interpretation by DOJ permitted Congress to include binding arbitration as part of the 1996 Act.[28]

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[24] *See Administrative Dispute Resolution: Hearings on H.R. 2497 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 101st Cong. 35-52 (1990) (statement of William P. Barr, Assistant Attorney General, Office of Legal Counsel).

[25] *See generally* Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).

[26] *See generally* Buckley v. Valeo, 424 U.S. 1, 139-140 (1976).

[27] *See* Constitutional Limitations on Federal Government Participation in Binding Arbitration, 1995 Op. Off. Legal Counsel 17 (Sept. 7, 1995). *See also* Hugh R. McCombs & Jeffrey W. Sarles, *Arbitration,* NAT'L L.J., Aug. 19, 1996, at B5.

[28] This Note does not address the constitutionality of binding arbitration of agency disputes. In addition to the abundance of literature already available on this subject, binding arbitration has for the moment been deemed constitutional by DOJ, and until a court addresses this issue the binding arbitration provision of the 1996 Act will remain in effect. The more pertinent inquiry at this juncture, therefore, is whether binding arbitration is conducive to and appropriate for government use.

For further literature on the constitutionality of binding arbitration, see Richard K. Berg, *Legal and Structural Obstacles to the Use of Alternative Dispute Resolution For Claims For and Against the Federal Government,* AGENCY ARB. 43 (ACUS Series No.

A second perceived problem with the 1990 Act was the lack of an express FOIA exemption. Under the 1990 Act, ADR communications were not expressly confidential. Instead, a communication was deemed confidential only if it fell within one of the nine disclosure exemptions of FOIA. Among the most notable of these FOIA exemptions are any "inter-agency or intra-agency" communication,[29] and any "trade secrets and commercial or financial information."[30] According to critics of the 1990 Act, the lack of an express exemption from FOIA created a "chilling effect" on the use of ADR in agency adjudications because private parties and agencies alike were reluctant to use ADR for fear of unwanted public disclosure.[31]

As a result of these shortcomings, the use of ADR has met much resistance and made a limited impact to date on dispute resolution in federal agencies.[32] While the parties have moved beyond the traditional manifest distrust of neutrals,[33] the 1990 Act was largely ineffectual. As a result, many agencies have implemented only cursory ADR programs, and have indicated no intent to implement these programs further.[34] Even the

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88-1, 1988); Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441 (1989); Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992); Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239 (1987).

[29] 5 U.S.C. § 552(b)(5) (1994).

[30] 5 U.S.C. § 552(b)(4) (1994).

[31] *See* Mark H. Grunewald, *Freedom of Information and Confidentiality Under the Administrative Dispute Resolution Act*, 9 ADMIN. L.J. AM. U. 985 (1996).

[32] *See* Cynthia B. Dauber, Note, *The Ties That Do Not Bind: Nonbinding Arbitration in Federal Administrative Agencies*, 9 ADMIN. L.J. AM. U. 165, 176 (1995).

[33] *See, e.g.*, Tobey v. County of Bristol, 23 F. Cas. 1313 (C.C.D. Mass. 1845) (No. 14,065):

> [A]rbitrators . . . possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. . . . They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but *rusticum judicium* [a rough or rude judgment].

Id. at 1321.

[34] The Securities and Exchange Commission (SEC) exemplifies this norm. The SEC had implemented ADR to a minimal extent, but subsequently announced that it does not plan to continue to do so if such programs are not mandatory. *See Doty Says*

Department of Justice, whose endorsement of the constitutionality of binding arbitration led in part to the expansion of ADR programs under the new Act,[35] has evinced a reluctance to implement widespread ADR programs by utilizing ADR in only three of its divisions since passage of the 1990 Act.[36]

The 1996 Act was therefore enacted with far stronger language than its predecessor. The binding arbitration and FOIA exemption provisions are indicative of Congress's desire to overcome this reluctance to use ADR in agency adjudications.[37] Parties to an ADR proceeding may now freely utilize arbitration without fear of an eventual reversal of the decision by the government.[38] Private parties also need no longer fear disclosure of confidential information via the Freedom of Information Act.[39] Certainly, there appears to be little question that these provisions will lead to increased use of ADR. The remaining analysis of this Note addresses these new provisions of the 1996 Act and examines whether their enactment was truly advisable in light of the negative effect on public accountability that is likely to arise.

III. THE LIKELY EFFECTS OF BINDING ARBITRATION ON AGENCY ADJUDICATIONS

A. *Despite the Act's Exceptions, Policy Issues Inevitably Will be Resolved by the Arbitrator*

The arbitration provision contained in the 1990 Act was unquestionably ineffectual. Section 590(c) of the Act stated:

> The head of any agency that is a party to an arbitration proceeding conducted under this subchapter is authorized to terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final by serving on all other parties a written notice to

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SEC Will Not Use Arbitration, Negotiated Rulemaking in its Activities, 23 SEC. REG. & L. REP. 910 (1991).

[35] *See supra* notes 27–28 and accompanying text.

[36] *See* Ruth Larson, *Agencies to Negotiate Spats Over Contracts*, WASH. TIMES, May 17, 1994, at A8.

[37] *See* 5 U.S.C. §§ 574, 580 (Supp. II 1996).

[38] *See id.* § 580.

[39] *See id.* § 574(j).

that effect, in which case the award shall be null and void.[40]

Thus, if an agency chose to vacate the arbitration award, the case would simply revert back to an administrative proceeding, effectively wiping the record clean between the parties as if the arbitration process had never taken place. The obvious defect in this statute is that it provides a private party with absolutely no incentive to engage in an arbitration proceeding with the federal government. With the government vested with this no-lose scenario of either winning the arbitration or simply vacating the decision if it lost, "why would anyone be foolish enough to want to go through negotiation and go through the expense of a negotiation which would be nothing more than giving the Government a chance to say I don't like the award and forcing you all the way back through an administrative proceeding."[41] The thirty-day opt-out provision was the creation of a compromise between the Department of Justice and the American Bar Association,[42] and was primarily intended to pacify the Justice Department's concern over the constitutionality of binding arbitration.[43] The result of such a one-sided provision was not surprising; there were no cases submitted for arbitration over the course of the 1990 Act.[44]

The 1996 Act obviates this problem by removing the thirty-day opt-out provision from the Act, thus permitting unfettered binding arbitration to occur in agency disputes.[45] Congress continued to recognize, however, that arbitration should not be implemented in all situations and therefore

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[40] Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, § 590(c), 104 Stat. 2736, 2743-2744 (1990).

[41] *Administrative Dispute Resolution: Hearings on H.R. 2497 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 101st Cong. 60 (1990) (statement of Representative James). Assistant Attorney General Barr speculated at that time that the opt-out provision could actually expand the use of arbitration by allowing government officials to be "less concerned that they are going to get locked into a position . . . if they feel that there is a safety valve of the review." *Id.* at 58. Obviously it was not the government's hesitance to arbitrate that was the problem with the opt-out provision.

[42] *See id.* at 39.

[43] *See supra* notes 24-26 and accompanying text.

[44] *See Reauthorization of the Administrative Dispute Resolution Act: Hearings Before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee*, 104th Cong. 5 (1995) (statement of Peter R. Steenland, Jr., Senior Counsel, Office of Alternative Dispute Resolution, Department of Justice).

[45] *See* 5 U.S.C. § 580 (Supp. II 1996).

maintained many of the 1990 Act's restrictions on the use of arbitration.[46] Perhaps the most important of these restrictions is contained in § 572(b)(2), which bars the use of ADR proceedings in policy-related controversies. Section 572(b)(2) states:

> An agency shall not consider using a dispute resolution proceeding if—
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> (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency.[47]

While this provision may seem sufficiently definitive in prohibiting agencies from engaging in arbitration of policy-laden disputes, circumvention of this section is likely to occur for several reasons, including: (1) political pressure to implement arbitration in agency adjudications as a means of "streamlining government";[48] (2) the existence of predispute arbitration clauses that are phrased excessively broadly to include policy matters, and which compel its signatories to participate;[49] (3) the natural tendency of parties to seek arbitration in order to gain reconciliation and finality in their dispute, resulting in unintentional (or perhaps intentional) disregard of public policy issues;[50] and (4) the tremendous difficulty in distinguishing claims involving public policy issues from merely private issues.[51] As a result of these factors, § 572(b)(2) is destined to be often ignored, with the end result being the undesirable intrusion of private arbitrators into matters of public policy.

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[46] *See* 5 U.S.C. § 572(b)(1)–(6) (Supp. II 1996). The 1996 Act requires that the head of an agency consider each of these factors for every case contemplating the use of binding arbitration. *See id.* § 575(c).

[47] *Id.* In addition to policy-related matters, binding arbitration is not permitted under the statute where a definitive resolution is required for precedential value, maintaining established policies is required for consistency, the case significantly affects persons who are not party to the proceeding, a full public record is required or where the agency must maintain authority to alter the disposition of the matter in light of changed circumstances and an ADR proceeding would hamper its ability to do so. *See* 5 U.S.C. § 572(b)(1)–(6) (Supp. II 1996).

[48] *See infra* notes 52–59 and accompanying text.

[49] *See infra* notes 60–69 and accompanying text.

[50] *See infra* notes 70–79 and accompanying text.

[51] *See infra* notes 80–86 and accompanying text.

The first factor that is likely to lead to binding arbitration of disputes containing public policy issues is the inherent political pressure to utilize binding arbitration in agency disputes. As stated above, the arbitration provision in the 1990 Act was never actually used due to the apparent chilling effect that the thirty-day opt-out had on private parties.[52] In order to provide any hope that arbitration would ever be conducted in agency disputes, the Justice Department had to provide a saving interpretation of the constitutionality of binding arbitration of government disputes, leaving itself open to criticism and, more significantly, eventual judicial review of the provision.[53] While the Department's interpretation has subsequently been upheld in a lower court,[54] the new position is contrary to that held for over 150 years by the judiciary and the executive, and is therefore likely to be controversial at the very least.[55] A statement by the Justice Department's Senior Counsel for Alternative Dispute Resolution before the House Judiciary Committee made it emphatically clear that the Department and all other federal agencies are to begin increasing their use of ADR processes, including binding arbitration:

> The Attorney General is . . . strongly committed to using alternative dispute resolution. She issued an order directing all civil litigators to attempt to make greater use of ADR techniques in their litigation . . . . We are working with the agencies . . . to encourage them to make greater use of ADR because, among other things, if those agencies can settle more cases administratively, then those are fewer cases that come to us for litigation.[56]

The White House has also made it known that it is strongly in favor of the increased use of arbitration. Vice President Gore's National

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[52] *See supra* note 44 and accompanying text.

[53] *See supra* notes 27–28 and accompanying text.

[54] *See* Tenaska Wash. Partners II L.P. v. U.S., 34 Fed. Cl. 434 (1995).

[55] The rule that private parties may not decide issues involving the federal government dates back to decisions handed down in the middle of the nineteenth century. *See* U.S. v. Ames, 24 F. Cas. 784, 790 (C.C.C. Mass. 1845) (No. 14,441) (holding that while arbitration awards involving the federal government are "sometimes useful," there is "no legal ground on which their execution can be compelled by a court of law").

[56] *Reauthorization of the Administrative Dispute Resolution Act: Hearings Before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee*, 104th Cong. 3 (1995) (statement of Peter R. Steenland, Jr., Senior Counsel, Office of Alternative Dispute Resolution, Department of Justice).

Performance Review (NPR) included "Encouraging Alternative Dispute Resolution When Enforcing Regulations" as one of its priorities for streamlining government.[57] In a discussion regarding NPR's regulatory reform recommendations, Jeffrey S. Lubbers, leader of NPR's Improving Regulatory Systems team, expressed the Clinton Administration's position on the expanded use of ADR, including arbitration:

> President Clinton has issued a directive requiring agencies to examine their internal rulemaking clearance processes and report in six months on the steps taken to improve them. It is our hope that the term "alternative dispute resolution" will soon be a misnomer as various techniques, such as mediation, arbitration, minitrial, and early neutral evaluation, become part of agencies' everyday menu for resolving disputes. The acronym ADR may be preserved by substituting "appropriate" for "alternative."[58]

This political pressure to use ADR techniques such as binding arbitration was one of the "practical concerns" enumerated by Assistant Attorney General Barr in resisting the inclusion of binding arbitration in the 1990 Act.[59] Given the paucity of ADR use to date in the 1990s, this political pressure can only have become more serious at this time, and therefore the risk of improper use of the binding arbitration provision in

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[57] *See* AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: THE REPORT OF THE NATIONAL PERFORMANCE REVIEW 322 (1993). *See also* Exec. Order No. 12,988, 61 Fed. Reg. 4729 (1996).

[58] Jeffrey S. Lubbers, *Twenty-Fifth Annual Administrative Law Issue: Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 43 DUKE L.J. 1165, 1173-1174 (1994).

[59] In hearings on the 1990 Act, Assistant Attorney General Barr presented two concerns regarding binding arbitration: (1) constitutional concerns *(see supra* notes 27-28 and accompanying text) and (2) practical concerns—these include the lack of precedential effect of the arbitrator's decision, lack of special expertise of the arbitrator, concerns that the arbitrator would rule on policy issues, the tendency of arbitrators to "split the difference" in adjudicating a dispute that would be disadvantageous to public funds and that political pressure would lead to inappropriate use of binding arbitration. According to Barr, "[t]he existence of a procedure for binding arbitration would create pressure to use that procedure. In many cases, an agency might find it easier to ignore the need for regularity and precedent and simply turn to binding arbitration as a means for escaping responsibility." *The Use of Alternative Dispute Resolution by Federal Agencies: Hearings on S. 971 Before the Subcommittee on Oversight of Government Management and the District of Columbia of the Senate Committee on Government Affairs*, 100th Cong. 92 (1989).

public policy settings is a most serious concern.

The use of predispute arbitration clauses is a second problem with the public policy exception. Such clauses are generally effective for ADR purposes because they provide assurance before a dispute even arises that ADR methods will be employed. This is traditionally the most prevalent method of creating arbitration proceedings, as evidenced by arbitrations organized under the American Arbitration Association, of which ninety-five percent of its 70,000 arbitrations occur as a result of predispute clauses.[60]

The problem with predispute arbitration clauses is that at the time they are created, the parties cannot predict the nature of their future disputes.[61] As a result, these clauses are phrased broadly in order to encompass any and all disputes that might arise.[62] While § 574(b)(2) of the 1996 Act states that policy-laden disputes are not to be tried before an arbitrator, conflict will naturally result from these broadly phrased arbitration provisions, as courts are reluctant to allow parties to back out of such contractually-binding provisions. In *Gemco LatinoAmerica Inc. v. Seiko Time Corp.*,[63] for example, the court permitted an antitrust claim, a claim that would seem to involve substantial policy issues, to go to arbitration, holding that the dispute did not sufficiently implicate policy in light of the predispute arbitration clause.[64]

The sanctions for parties who refuse to arbitrate despite the existence of predispute clauses are often severe.[65] An outright refusal to arbitrate may result in the award of costs and fees incurred by the opposition in the arbitration and all related proceedings,[66] or even the loss of the right to trial de novo.[67] In one case, the defendant simply elected not to attend the arbitration in defiance of a court order and local court rules.[68] The court

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[60] *See* Ted E. Pons, *AAA Business Expanded in 1993*, DISP. RESOL. TIMES, Spring 1994, at 1.

[61] *See* Dauber, *supra* note 32, at 187.

[62] *See id.*

[63] 671 F. Supp. 972 (S.D.N.Y. 1987).

[64] *See id.* at 979-980. *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (holding that "having made the bargain to arbitrate, the party should be held to it"); Dauber, *supra* note 32, at 187 n.129.

[65] *See* Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 38 (1993).

[66] *See* Gilling v. Eastern Airlines, 680 F. Supp. 169, 171-172 (D.N.J. 1988).

[67] *See* New England Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712, 715 (E.D. Pa. 1983).

[68] *See Gilling*, 680 F. Supp. at 170.

had little difficulty assessing costs and fees against the defendant in this instance.[69] These sanctions present an obvious dilemma for parties involved in agency adjudications in which there is a predispute arbitration clause—consent to arbitrate the policy-laden dispute or face the strong possibility of severe sanctions for noncompliance. In such a scenario, the immediate interests of the parties are likely to take precedence over the potential policy and accountability concerns raised by the use of binding arbitration.

Another factor likely to lead to the arbitration of policy issues is the parties' natural desire to attain reconciliation because it is in their best interest financially. Admittedly it will often be the case that binding arbitration is the best way to bring adverse parties together in gaining the quickest resolution at the lowest cost to the parties—such is the utility of arbitration and ADR in general. While this result is normally praiseworthy, there are some disputes where the failure to "see the forest over the trees" results in settlements that simply ignore policy issues present in the case.[70]

A vivid example of such shortsightedness occurred in the consolidated asbestos litigation, conducted in 1994 between a group of experienced plaintiffs' lawyers and the Center for Claims Resolution (CCR), a claim-settling organization utilized by the asbestos defendants.[71] The plaintiffs' lawyers and CCR negotiated an agreement that established award amounts for the class of individuals who develop future asbestos-related illnesses. This settlement may in fact have been the best achievable result for all concerned under the circumstances, since the suit included numerous bankrupt defendants and a tremendous backlog of claims.[72] Those with future asbestos illnesses received guarantees of future recompense,[73] and lawyers for the class greatly benefited financially from the settlement.[74]

It is quite evident from the proceedings, however, that the policy issue

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[69] *See id.* at 171–172.

[70] *See* Edwards, *supra* note 12, at 679.

[71] *See* Georgine v. Amchem Products, Inc., 157 F.R.D. 246 (E.D. Pa. 1994).

[72] It has been estimated that asbestos claims in 1985 composed 31.3% of the entire federal products liability docket, and accounted for much of the 758% growth in products liability filings in the federal courts between 1974 and 1985. *See* Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 24 (1986).

[73] *See* David Luban, *Settlement and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2659–2660 (1995).

[74] Separating pre-existing claimants from future claimants is estimated to have increased the fees of the plaintiffs' lawyers by somewhere between 100–250%. *See* Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, 80 CORNELL L. REV. 1045, 1059–1069 (1995).

of the optimal means of resolving the asbestos problem was completely ignored at the expense of the immediate concerns of the actors involved.[75] The settlement agreement included the equivalent of a "lockout agreement" in which plaintiffs' lawyers agreed not to represent future claimants against the same defendants in similar cases.[76] Additionally, the class of claimants established by the plaintiffs' lawyers was structured to exclude pre-existing clients, whose cases were settled separately under more favorable terms.[77] While one would expect the court to closely scrutinize such an outcome in defense of the public interest, the court actually accorded little review to the settlement terms in its apparent eagerness to remove the claims from its docket.[78] Thus, while the agreement may have been the best result for the parties at the time it was reached, future ramifications may include under-compensated victims and nonculpable defendants—hardly an optimal solution in terms of public policy. Such a specious result is not unique, however, since parties are naturally inclined to seek the quickest and least expensive resolution first. The "self-dealing process by which this particular sausage emerged from the grinder"[79] was the natural result of the disputants desire to gain the most efficient resolution. Such outcomes are likely to be repeated in agency adjudications where binding arbitration allows a private party to escape a costly court adjudication. As was the case with the reviewing court in *Georgine v. Amchem Products*, agencies are likely to ignore its obligation not to arbitrate policy issues where it can clear a lingering case from its crowded docket.

Another problem with the public policy exception is that it assumes that agencies will actually be able to identify cases where public policy issues exist. Historically, there has never been any definitive boundary delineating the public and private spheres in this country, nor has any satisfactory theory emerged to date.[80] One distinction is that public rights are created where the basis for the claim evinces a goal "designed to achieve ends other than doing justice between the parties to a dispute."[81] The problem

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[75] *See* Luban, *supra* note 73, at 2659-2660 (1995).

[76] *See id.* at 2660.

[77] *See id.* at 2659.

[78] One commentator has referred to the settlement terms as "tainted" and approved "to help rid the court system of the terrible burden imposed by what appears to be interminable asbestos litigation." *Id.* at 2660.

[79] *Id.*

[80] *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426-1427 (1982).

[81] Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration*

with this distinction is that nearly all statutes and actions under common law seek to "govern and mold conduct" in some way, as there is a "'social' or 'public' interest in the average commercial contract dispute just as in a securities claim or a civil rights claim."[82] Thus, to arbitrarily divide public from private law "would ignore the social values and the legal development present even in disputes traditionally viewed as involving private law."[83]

Recent developments in the law have also served to blur this distinction. One such trend is the privatization of government functions. Statutory corporations such as the Tennessee Valley Authority and Amtrak perform functions which contain obvious policy ramifications, yet are often conducted among purely private actors.[84] Another development that leaves the public-private law distinction unavailing is the annex of traditionally private law domains into statutory law.[85] Many areas traditionally viewed under private law such as contract, tort, property, agency, landlord-tenant, family and commercial law have now been codified by legislatures driven by public policy concerns.[86] Will cases in these areas be subject to binding arbitration under the 1996 Act merely because they are traditionally not part of the public law? If Congress hopes to truly enforce the public policy exception, it must require the agency to take a hard look at the case before it in order to ensure that policy issues are not at hand. While such a directive may be theoretically possible, it seems inevitable that disputes laden with policy issues will come before binding arbitration by a private neutral.

Agreements, 22 ST. MARY'S L.J. 259, 351 (1990).

[82] *Id.*

[83] Daniel Misteravich, *The Limits of Alternative Dispute Resolution: Preserving the Judicial Function*, 70 U. DET. MERCY L. REV. 37, 44 (1992).

[84] *See* Bruff, *supra* note 28, at 458. *See also* John T. Tierney, *Government Corporations and Managing the Public's Business*, 99 POL. SCI. Q. 73, 75 (1984).

[85] *See* Horwitz, *supra* note 80, at 1426. *See also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

[86] *See* Misteravich, *supra* note 83, at 44–45.

B. *The Negative Implications of Private Parties Resolving Public Policy Disputes*

But why should society care if a private arbitrator happens to have a say in a public policy matter from time to time? After all, society already vests a significant quasi-judicial authority in the arbitrator by enabling him to decide cases that have substantial effects on the lives of private parties and the government—why not give the arbitrator a shot at lawmaking as well? There are several important reasons why private arbitrators should not decide policy issues. Permitting such arbitration implicates: (1) procedural concerns, because arbitrators are not required to provide any rationale for their decision;[87] (2) institutional concerns, since the only check on the arbitrator's decision is judicial review, which has become increasingly deferential to the opinion of arbitrators;[88] and (3) substantive concerns, due to the conflict between the values of the arbitrator and those of the nation as a whole.[89]

An initial problem with vesting private arbitrators with the power to decide policy issues is that the arbitrator often lacks the requisite knowledge to properly make a determination. It is a common maxim that the "specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."[90] Furthermore, there is no requirement that arbitrators apply the applicable laws to the dispute, nor that they even be lawyers. Thus, arbitrators are often "wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so."[91]

Procedurally, one shortcoming of the arbitration process is its informality. While this also serves as a strength in enabling parties to avoid some of the constraints of a court adjudication, the informality of the arbitration process fails to ensure that the arbitrator's decision is based on reasoning in accord with sound public policy. The record of the arbitration proceeding is less complete, the usual rules of evidence do not apply and rights and procedures common to all civil trials, such as discovery, compulsory process, cross-examination and testimony under oath are often

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[87] *See infra* notes 93–95 and accompanying text.

[88] *See infra* notes 96–101 and accompanying text.

[89] *See infra* notes 102–107 and accompanying text.

[90] Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

[91] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967) (Black, J., dissenting).

severely limited or unavailable.[92]

Perhaps the biggest procedural weakness of arbitration in terms of public policy adjudication is the failure to require arbitrators to provide a rationale for their decision. As stated by one scholar:

> In public-law disputes, greater weight deserves to be placed on [providing a rationale for the decision]: more urgent and nonnegotiable public policies will typically be at stake, and the employer's future conformity to statutory norms becomes much more pertinent. Moreover, there is presumably a greater need in public-law disputes to assure that arbitration decisions conform to law and are amenable to minimal judicial review, objectives that would be frustrated were such decisions terse and opaque.[93]

In *Gilmer v. Interstate/Johnson Lane Corp.*,[94] the Court held that arbitration awards need only "be in writing" and contain "the names of the parties, a summary of the issues in controversy, and a description of the award issued" and that such awards be "made available to the public."[95] These requirements are insufficient for policy disputes, which require the decision-maker to alert the parties and the public at large of the considerations that underlie the decision. When public policy matters are at issue, the public has a right to know the policy basis on which the case has been decided. The lack of a rationale requirement therefore makes arbitration an unsatisfactory forum for disputes concerning policy.

Another major problem with permitting private arbitrators to decide policy issues is the lack of a sufficient institutional check on the arbitrator's decision. While the practice of allowing private arbitrators to decide policy issues is itself objectionable, it would be much less problematic, especially from an accountability perspective, if a meaningful, "hard look" approach was taken of the arbitrator's action by the reviewing court.[96] Unfortunately, this is not the case.

Review of binding arbitration awards under the 1996 Act is handled under the terms of the Federal Arbitration Act (FAA).[97] The power given

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[92] *See Alexander*, 415 U.S. at 57–58.

[93] Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635, 666.

[94] 500 U.S. 20 (1991).

[95] *Id.* at 31–33.

[96] *See* Gorman, *supra* note 93, at 669–670.

[97] 9 U.S.C. § 10(a) (1994).

to courts under the FAA is extremely narrow.[98] Rather than providing any scrutiny over the arbitrator's substantive decision, review of arbitrator decisions is limited to corruption, fraud or undue means in procuring the award, obvious partiality, prejudice or corruption by the arbitrator and acts which otherwise exceed their delegated power.[99] While some of the language of the FAA could be construed expansively, including the court's ability to overturn an award because of "misconduct" of the arbitrator, this provision has been interpreted quite narrowly by the courts.[100] The end result is the lack of any real scrutiny of the arbitrator's decision.[101]

Perhaps the most fundamental defect in permitting a private arbitrator to decide public policy issues is the potential conflict between the arbitrator's values and those of the community at large. As stated by Judge Edwards:

> [I]f ADR is extended to resolve difficult issues of constitutional or public law—making use of nonlegal values to resolve important social issues or allowing those the law seeks to regulate to delimit public rights and duties—there is real reason for concern. An oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of public values.[102]

Thus, arbitration is simply not appropriate where policy issues are at stake, as "often our nation's most basic values . . . conflict with local nonlegal mores."[103] Examples of this conflict appeared in the Boston

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[98] *See* Gorman, *supra* note 93, at 670.

[99] *See* 9 U.S.C. § 10(a) (1994).

[100] *See* Gorman, *supra* note 93, at 670. *See also* Shearson/American Express v. McMahon, 482 U.S. 220 (1987) (upholding an arbitrator's instructions to enforce public law obligations). While the Court has held that arbitral awards may be reversed if decided contrary to "explicit" public policy, i.e. contained in "laws and legal precedents," arbitration decisions may not be overturned based on "general considerations of supposed public interests." W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983).

[101] The Supreme Court's deferential review of arbitration decisions differs from judicial review in many state courts, where judges are able to subject the award to a higher level of judicial review. *See, e.g.*, Faherty v. Faherty, 477 A.2d 1257, 1262–1263 (N.J. 1984) (conducting a de novo review of arbitral awards of child support).

[102] Edwards, *supra* note 12, at 676. Judge Edwards is currently the Chief Judge of the United States Court of Appeals for the District of Columbia.

[103] *Id.* at 677.

desegregation battle, as well as in the civil rights conflicts in the South in the 1960s, where the basic American value of equal justice under the law conflicted with local court mores.[104] A current example of this problem exists in the negotiation of toxic waste disputes.[105] While the expedient resolution of these disputes may be to the advantage of the parties involved, negotiations that compromise standards created by Congress result in the "application of values that are simply inconsistent with the rule of law."[106] The use of binding arbitration takes this risk every time a private arbitrator settles a dispute grounded on a statutory provision. The existence of the statute represents a policy choice decided by our nation's democratically elected lawmakers. Even if it would appear to be a good result when parties come to a middle ground, such middle ground will necessarily represent a departure from laws that reflect our nation's values. While a private arbitrator is not compelled to consider the public at large, an agency's role as representative of the public interest "does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; *the right of the public must receive active and affirmative protection.*"[107] As an unelected, unappointed participant in the process, the arbitrator should not be permitted to fill in for the agency where such public laws are at stake.

IV. THE NEW FOIA EXEMPTION AND ITS EFFECT ON AGENCY ADJUDICATIONS

Confidentiality is essential to any ADR process. Whether it be in an arbitration, mediation or any other type of ADR proceeding, parties will not be willing to freely divulge information to the neutral unless they receive assurance that such information will not be leaked to the adverse party or to the general public. Although this policy may not be controversial in most areas in which ADR operates, a different dynamic exists where the government is a party to the litigation. The Freedom of Information Act requires that agencies disclose certain information to the public.[108] The Act "begins from the premise that openness in government

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[104] *See id.*

[105] *See id.*

[106] *See id.*

[107] Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965) (emphasis added).

[108] *See* 5 U.S.C. § 552(a) (1994).

serves the public interest and from the further premise that members of the public have the right to know what government officials are doing."[109]

There is thus an inherent conflict present in the degree of confidentiality to be accorded ADR proceedings in agency adjudications—the public's right to know versus a party's desire for confidentiality. In resolving this conflict, the law must strike "a careful balance . . . between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements."[110] In striking this balance under the 1996 Act, however, Congress appears to have tilted the balance too far to the side of confidentiality, with openness and public accountability sacrificed as a result.

The tension between FOIA and agency ADR was not addressed until the final stages of the hearing process under the 1990 Act. Under the 1990 Act, confidentiality was extended to any dispute resolution communication, except as specifically identified under the Act.[111] The availability of agency records under FOIA was not addressed, however, in the original bill.[112] This issue was finally addressed as an amendment on the Senate floor, submitted by Senator Patrick Leahy, chairman of the Judiciary subcommittee with jurisdiction over the Freedom of Information Act. While the Senate had considered adding a FOIA exemption to the 1990 Act, Senator Leahy was hesitant to take this step due to the potential conflict with the purpose and intent of FOIA.[113]

As a result, § 574(j) was added to the 1990 Act, which provided that the Act "shall not be considered a statute specifically exempting disclosure" under FOIA.[114] It is worth noting that without this amendment, the confidentiality section contained in § 574(a) and (b), would likely have qualified as a "statute" within the meaning of Exemption 3 of FOIA, and thus the Act would not have been subject to FOIA.[115] The result of § 574(j)

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[109] McReady v. Department of Consumer and Regulatory Affairs, 618 A.2d 609, 627 (D.C. 1992) (Ferren, J., dissenting).

[110] Recommendation 88-11 of the Administrative Conference of the United States, *reprinted in* 41 ADMIN. L. REV. 357 (1989).

[111] *See* Pub. L. No. 101-552, 104 Stat. 2740-2741 (1990).

[112] *See id.*

[113] *See* 136 CONG. REC. S18088 (daily ed. Oct. 24, 1990). Senator Leahy stated, "I was unwilling to carve out an exception in this bill from FOIA requirements in the final days of this Congress. I think such a step requires more deliberation." *Id.*

[114] Pub. L. No. 101-552, 104 Stat. 2741 (1990).

[115] *See* 5 U.S.C. § 552(b)(3) (1994). One of nine statutory exemptions to FOIA,

was a "trumping effect" of FOIA over the 1990 Act,[116] with all documents submitted pursuant to an agency ADR proceeding subject to disclosure unless exempted by one of nine statutory exemptions of FOIA.[117]

Under the 1996 Act, the new § 574(j) provides a specific exemption from FOIA. Section 574(j) states that "[a] dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under § 552(b)(3)."[118] This section removes the trumping effect of FOIA by specifically granting confidentiality to any communication between a party and a neutral. There are two significant problems with this exemption: (1) it is superfluous and, most importantly, contrary to the purpose and intent of FOIA, because FOIA Exemptions 4 and 5 cover every situation in which a party is properly entitled to confidentiality in an agency ADR proceeding;[119] and (2) it is subject to abuse by parties to an ADR proceeding, with the outright exemption for all communications involving the neutral enabling parties to avoid disclosure of documents otherwise available to the public in a traditional litigation.[120]

In analyzing the reasoning behind this change, it must first be noted that the new FOIA exemption was not created in response to an onslaught of court cases holding that documents submitted by parties to an agency ADR proceeding must be mandatorily disclosed. In actuality, quite the opposite is true; there have been no reported cases in which litigants used FOIA as the basis for receiving access to an ADR communication.[121] This result has been described as misleading, however. The argument made by advocates of the new FOIA exemption is that the newness and complexity of the 1990 Act rendered parties unable to understand the relationship between the confidentiality section of the 1990 Act and FOIA.[122] Another argument offered to explain the lack of FOIA challenges is the chilling effect that § 574(j) of the 1990 Act had on parties, who were discouraged

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this section provides an exemption from disclosure by statute where "such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." *Id.*

116 *See* Grunewald, *supra* note 31, at 993.

117 5 U.S.C. § 552(b)(1)-(9) (1994).

118 5 U.S.C. § 574(j) (Supp. II 1996).

119 *See infra* notes 130-164 and accompanying text.

120 *See infra* notes 165-170 and accompanying text.

121 *See* Grunewald, *supra* note 31, at 998.

122 *See id.* at 998-1000.

from utilizing ADR due to the risk of disclosure they would face under FOIA.[123]

The first of these contentions, that no cases have arisen due to the parties' inability to understand the 1990 Act, is unavailing. It is extremely unlikely that experienced Washington lawyers, who have made their living zealously representing corporate clients in disputes with the government, would be unaware of the potential opportunity to use FOIA as a means of discovering information. Section 574(j) could not have been any more explicit in its directive that FOIA applies to the Act, stating that the Act "shall not be considered a statute specifically exempting disclosure" under FOIA.[124] Aside from placing this section in large bold print with flashing lights around it, it seems that this is language that even a novice in government adjudications could discern, much less experienced Washington counsel. In short, ignorance of the statute which governs ADR proceedings in agency adjudications does not adequately explain the shortage of FOIA controversies under the 1990 Act.

The second explanation suggested for the lack of FOIA challenges under the 1990 Act is that the absence of a FOIA exemption produced such a chilling effect due to uncertainty over the types of documents that were disclosable, that parties were deterred from using ADR.[125] This claim is substantiated by a number of agency officials, who have testified that uncertainty over FOIA's effect on ADR confidentiality has been a significant deterrent to use of the process.[126] While such a chilling effect on the use of ADR in agency adjudications has undoubtedly occurred, particularly in arbitration,[127] this explanation is also dubious. Several agencies including the Army Corps of Engineers, Air Force Civilian Appellate Review Agency and the Federal Aviation Administration have utilized ADR consistently since the promulgation of the 1990 Act.[128] The use of ADR in these agencies has provided numerous opportunities for nonlitigants to use FOIA to uncover sensitive documents submitted in the course of an ADR proceeding. As stated above, counsel to agency adjudications are hardly novices, and likely would not refrain from utilizing FOIA as a means for uncovering such information. While the lack of FOIA

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123 *See id.*

124 Pub. L. No. 101-552, 104 Stat. 2741 (1990).

125 *See* Grunewald, *supra* note 31, at 999.

126 *See id.* at 999-1000.

127 *See supra* note 44 and accompanying text.

128 *See supra* notes 17-22 and accompanying text.

challenges may not indicate that the 1990 Act was ideal, it represents at the very least that the lack of a FOIA exemption did not create a windfall method of receiving confidential information.

With this in mind, the question must be asked whether the FOIA exemption created by the 1996 Act was necessary at all. Under the 1990 Act, the test for confidentiality was whether the item in question fit within one of the nine statutory exemptions contained in FOIA.[129] While FOIA does not contain an explicit exemption for ADR proceedings, Exemptions 4 and 5 of FOIA sufficiently protect the confidentiality of parties to a government ADR proceeding—Exemption 5 protects the government, while Exemption 4 protects the disclosure concerns of private litigants.[130]

Under Exemption 5, any "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempted from disclosure.[131] Thus, any communication between two or more agencies or within a single agency will be exempted from disclosure under Exemption 5. The purpose of this exemption is to protect all documents used in the deliberative process of government before the government issues its official policy. As stated by the Supreme Court in *NLRB v. Sears, Roebuck & Co.*,[132] Exemption 5 "is designed to encourage a free and candid exchange of ideas during the process of decisionmaking and to prevent predecisional disclosure of incipient policy or decisions that could disrupt agency procedures."[133] This privilege ensures that agencies will not be "chilled" from conducting honest policy debates, as were it not for this privilege, "too many analyses would be stillborn or wishy-washy."[134]

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[129] 5 U.S.C. § 552(b)(1)-(9) (1994).

[130] In addition to Exemptions 4 and 5, Exemption 6 for "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and Exemption 8 for documents "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions" also cover many documents that parties might seek to keep confidential. *See* 5 U.S.C. § 552(b)(6), (8) (1994).

[131] 5 U.S.C. § 552(b)(5) (1994).

[132] 421 U.S. 132 (1975).

[133] *Id.* at 151.

[134] Quarles v. Dep't of the Navy, 893 F.2d 390, 393 (D.C. Cir. 1990). *See also* JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE § 15.01 (1996) (stating that "Congress was encouraged by the bureaucracy to avoid requiring agency policy debates to be conducted in a publicly accessible forum, with self-serving memoranda written for

This exemption has been interpreted very broadly by the courts. The Supreme Court in particular has given considerable deference to privileges against disclosure of internal government documents.[135] In *FTC v. Grolier Inc.*,[136] the Court held that Exemption 5 incorporates all civil discovery privileges because allowing parties to obtain material that is normally privileged via FOIA would effectively permit the use of FOIA to supplant civil discovery.[137] Employees of the agency are not the only persons who may invoke the privilege—the statements of outside consultants within agency files are also protected from disclosure under Exemption 5 when consultants are deliberating on agency policy.[138] Even purely factual records are privileged from disclosure under Exemption 5 if such documents are "inextricably intertwined" with recommendations,[139] are of sufficient significance in a lengthy record of scientific data,[140] or underlie the basis for subjective recommendations within an agency.[141] Under such liberal interpretations of Exemption 5, all an agency must demonstrate in order to withhold sensitive documents is that the document was in some way connected to deliberation over a final policy decision.[142] This

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future observers rather than for the honest discussion of the issues.").

[135] *See* O'REILLY, *supra* note 134, § 15.01.

[136] 462 U.S. 19 (1983).

[137] *See also* United States v. Weber Aircraft Corp., 465 U.S. 792, 798 (1984); Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 354 (1979); Renegotiation Board v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975) (holding that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context."); EPA v. Mink, 410 U.S. 73, 86 (1973).

[138] *See* CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987) (stating that "courts have repeatedly found that a privilege attaches to reports of outsiders commissioned by an agency to perform agency work, when such reports would be protected if compiled within the agency itself."); Ryan v. Department of Justice, 617 F.2d 781, 790 (D.C. Cir. 1980); Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); Conoco, Inc. v. Department of Justice, 521 F. Supp. 1301, 1305 (D. Del. 1981).

[139] *See* EPA v. Mink, 410 U.S. 73, 108 (1973) (Douglas, J., dissenting); Wolfe v. Department of HHS, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc).

[140] *See* Montrose Chem. Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974).

[141] *See* Lead Indus. Ass'n v. OSHA, 610 F.2d 70 (2d Cir. 1979); Theriault v. United States, 503 F.2d 390 (9th Cir. 1974).

[142] *See* O'REILLY, *supra* note 134, § 15.01 (stating that "a record can on its face not seem deliberative but the agency could meet its burden to show deliberation had occurred and this document was part of the process").

exemption thus fully protects the confidentiality of agency documents. Rather than providing the agency with peace of mind regarding disclosure, the new exemption in effect grants the agencies *carte blanche* to withhold documents that were not anticipated by FOIA.

In the same manner in which Exemption 5 protects agency confidentiality concerns, Exemption 4 likewise fully protects the confidentiality concerns of private parties to an ADR proceeding with the federal government. Under this exemption, all "trade secrets and commercial or financial information obtained from a person and privileged or confidential" are exempted from disclosure under FOIA.[143] Exemption 4 therefore exempts all documents that are (1) trade secrets, (2) commercial or financial information and (3) subject to a common law privilege or confidential in nature. Like Exemption 5 caselaw, courts have applied an extremely broad reading to Exemption 4.

Trade secret claims under Exemption 4 are determined in the same manner as trade secret claims in ordinary commercial cases.[144] Such claims are generally governed by the Restatement of Torts, section 757, comment b, which provides that a trade secret "may consist of . . . information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."[145] Courts are very reluctant to divulge any information that might potentially constitute a loss of a trade secret to a company. As stated by Judge Gesell, then of the U.S. District Court for the District of Columbia, "[t]he public interest is, clearly, that you don't take people's property under process and throw it around indiscriminately to people who haven't done any work for it, haven't shown any initiative, and haven't done anything to create it."[146] Agencies are even more reluctant to divulge trade secrets in an Exemption 4 proceeding.[147]

The commercial or financial information standard also does not present an onerous burden to private parties. In *M/A-Com Info. Systems v. HHS*,[148]

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[143] 5 U.S.C. § 552(b)(4) (1994).

[144] *See* O'REILLY, *supra* note 134, § 14.04.

[145] *Id.*

[146] *Judge Gesell Speaks His Mind as Insulation Makers Fight Trade Secret Turnover*, FTC: WATCH (Washington Regulatory Reporting Group, Inc., Washington, D.C.), Jan. 26, 1979, at 8.

[147] *See* O'REILLY, *supra* note 134, § 14.04 (stating that "[i]n practice, if an agency sees a colorable claim of trade secret status, the exemption (b)(4) claim should be invoked").

[148] 656 F. Supp. 691 (D.D.C. 1986).

for example, the court held that Exemption 4 applies for *any commercial information* demonstrated by a private party:

> [I]t is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure of this kind of material under FOIA were required. Thus, *while the commercial information may be slight, it should be protected under the exemption.*[149]

The drafters of Exemption 4 also created a separate category of protection for documents that might not be commercial, but which relate directly or indirectly to financial matters of the private litigant. Examples of protected financial information documents include an individual's salary,[150] credit status[151] and sources of personal income.[152]

In addition to showing the existence of a trade secret, commercial or financial information, the information sought to be withheld must be subject to a common law privilege or be confidential in nature. The privilege requirement includes all privileges recognized in federal statutes, rules, common law or in the Constitution.[153] Privileges recognized by the courts have included civil discovery privileges, attorney-client privilege, attorney work product, doctor-patient privilege, self-evaluative studies and lender-borrower documents.[154] Indeed, courts have evinced little reluctance to withhold privileged documents under Exemption 4.[155]

The primary battleground for Exemption 4 cases has been fought over the confidentiality component of the statute. In *National Parks and*

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[149] *Id.* at 692–693 (emphasis added).

[150] *See* 9 to 5 Organization for Women Office Workers v. Federal Reserve Sys., 721 F.2d 1 (1st Cir. 1983).

[151] *See* Stone v. Export-Import Bank of the United States, 552 F.2d 132 (5th Cir. 1977).

[152] *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

[153] *See* Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 400 (5th Cir. 1985).

[154] *See* United States v. Weber Aircraft Corp., 465 U.S. 792, 798 (1984) (civil discovery privilege); Washington Post Co. v. HHS, 865 F.2d 320 (D.C. Cir. 1989) (self-evaluative studies); Artesian Indus. Inc. v. HHS, 646 F. Supp. 1004, 1009 (D.D.C. 1986) (attorney-client); Indian Law Resource Ctr. v. Department of the Interior, 477 F. Supp. 144, 148 (D.D.C. 1979) (attorney work product).

[155] *See* O'REILLY, *supra* note 134, § 14.05 (examining privileges recognized by federal courts and concluding that "the future potential of the 'privileged' category is great").

Conservation Ass'n v. Morton,[156] the D.C. Circuit created a two part test for determining whether a document submitted by a private party to the government is confidential. According to the court:

> [C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[157]

National Parks thus enables a private party to attain confidentiality where disclosure will either impair the government's ability to obtain needed information in the future, or will cause "substantial harm" to the private party. Courts have exempted a wide array of documents from disclosure under this standard. Under the first prong, documents will be classified as confidential if it is demonstrated that disclosure will impair the government's ability to procure needed information from that private party in the future. The D.C. Circuit has applied a balancing test to determine impairment, measuring the "rough balance of the extent of impairment and the importance of the information against the public interest in disclosure."[158] Under such a standard, all the private party need show is that the government's interest in the documents outweighs the need for disclosure to the requesting party.[159]

The preponderance of litigation over the confidentiality question has been centered around the second facet of *National Parks*, which provides that no documents shall be disclosed where substantial harm will result to the party submitting the documents. The harm that qualifies a record under this exception is only a *likelihood of harm* to the private party relative to other competing companies or organizations.[160] It is not required that actual harm result in order to prevent disclosure.[161] Indeed, injury need not be a

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[156] 498 F.2d 765 (D.C. Cir. 1974).

[157] *Id.* at 770.

[158] Washington Post v. HHS, 865 F.2d 320, 326-327 (D.C. Cir. 1989).

[159] *See* Bartholdi Cable Co. v. FCC, 114 F.3d 274, 282 (D.C. Cir. 1997) (upholding the withholding of documents by the FCC under Exemption 4 because of the government's "compelling interest in the information at issue.").

[160] *See* O'REILLY, *supra* note 134, § 14.11.

[161] *See e.g.* Orion Research v. EPA, 615 F.2d 551, 553-554 (1st Cir. 1980); Gulf & W. Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979).

certainty, nor must extrinsic evidence of injury be presented. As stated by the D.C. Circuit, "[i]n order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is all that need be shown."[162]

In *Critical Mass Energy Project v. NRC*,[163] the D.C. Circuit made the substantial harm test even more favorable to private parties by invoking protection for any communication submitted voluntarily to an agency. The court reasoned:

> It is a matter of common sense that the disclosure of information that the Government has secured from voluntary sources on a confidential basis will both jeopardize its continuing ability to secure such data on a cooperative basis and injure the provider's interest in preventing its unauthorized release. Accordingly . . . we conclude that financial or commercial information provided to the Government on a voluntary basis is "confidential" for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person for whom it was obtained.[164]

Although *Critical Mass* has been criticized by many as a means for allowing private parties to keep documents confidential by merely voluntarily submitting them to the agency, the case further ensures that confidential information not normally released to the public remains protected under an agency ADR proceeding.

Employing Exemptions 4 and 5 together, an agency can be assured of the confidentiality of its documents as long as they are used in deliberation of an eventual agency policy, while private litigants' documents are exempted from disclosure if they contain trade secrets or commercial information of any kind and are privileged or will cause harm to the party or the government. These exemptions are completely inclusive in their protection of ADR communications and, rather than parties' ignorance of the law or the chilling effect caused by the former ADR Act, provide the best explanation for why no disputes arose over the FOIA standard for confidentiality under the 1990 Act. The new FOIA exemption serves only

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[162] *Gulf & W. Indus.*, 615 F.2d at 530. *See also* National Parks Ass'n v. Kleppe, 547 F.2d 673, 678-679 (D.C. Cir. 1976); Timken Co. v. Customs Serv., 491 F. Supp. 557, 559 (D.D.C. 1980).

[163] 975 F.2d 871 (D.C. Cir. 1992) (en banc).

[164] *Id.* at 879.

to improperly exempt documents which are properly available to the public under FOIA.

Creation of a FOIA exemption under 1996 Act will have a greater effect than merely adding duplicative and inconsistent regulations, however. The broad sweep of the new § 574(j) will be subject to abuse from parties to an ADR proceeding, who will now be able to exclude communications that would otherwise be public record in a formal adjudication. This result is contrary to the core purpose of FOIA, which is to allow the public to know "what their government is up to"[165] and serves to greatly reduce government accountability and accessibility.

The potential for abuse under the language of the 1996 Act was recognized by the conference committee which instituted the bill's final changes.[166] The committee realized that the FOIA exemption could lead to misuse by the parties:

> The Managers recognize that the intent of the Conference Agreement not to exempt from disclosure under FOIA a dispute resolution communication given by one party to another party could easily be thwarted if a neutral in receipt of a dispute resolution communication agrees with a party to in turn to pass the communication on to another party. It is the intent of the Managers that if the neutral attempts to circumvent the prohibitions of the ADR Act in this manner, the exemption from FOIA would not apply. . . . The Managers would not expect the parties to use the new exemption as a mere sham to exempt information from FOIA.[167]

Although it may be the intent of the committee that the "mere sham" use of the FOIA exemption not be permitted, enforcement of this borders on the impossible. Parties will now be able to avoid disclosure of communications that do not fall within the intended sweep of the FOIA exemption—those between the parties themselves—merely by passing the communication through the neutral, and having him pass the communication to the other party. If the confidentiality of such a communication is sufficiently important, it is foreseeable that parties may now resort to ADR merely to avoid publicly divulging information that would otherwise be available in a formal adjudication. This was obviously

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[165] Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

[166] *See* H.R. REP. NO. 104–841, at 8.

[167] *Id.*

not the intent of the 1996 Act, but it is a real and very dangerous potential consequence of the new FOIA exemption.[168]

Assume for example that a well-known manufacturer is involved in litigation with EPA for clean-up costs under the Clean Air Act.[169] Under a formal adjudication, the manufacturer would have to submit evidence for the public record disclosing its emission levels in order to show that they do not fall below the level established by the Act. Such a submission might show that the company has achieved the allowable level by balancing lower emission levels in certain areas in order to counteract, or "offset" as the term has come to be known, higher emissions in other areas.[170] Because this is information that the manufacturer would obviously like to keep secret from residents living in the area where the higher emissions are present, it could encourage use of ADR in order to keep this information confidential. All the manufacturer would have to do under the 1996 Act is simply stipulate that all communications in the ADR proceeding will be made through the neutral, a common request in ADR. Under such a scenario, the utility of ADR has been defeated, as rather than being entered into for efficiency purposes, ADR has been used to reduce public knowledge and government accountability by permitting a manufacturer to impermissibly achieve confidentiality. Foreseeable scenarios such as these exhibit how the 1996 Act, in its attempt to "balance" openness in government with the parties' need for confidentiality, has erred on the side of confidentiality, with the general public the loser as a result.

V. CONCLUSION

The Administrative Dispute Resolution Act of 1996 was created with the intent of broadening the use of ADR in agency adjudications. That such an increase in the use of ADR was needed is confirmed by the overall paucity of ADR use during the course of the 1990 Act. The concern expressed in this Note, however, is that in opening the door for greater ADR use, the bipartisan congressional effort which resulted in the 1996 Act may have gone too far at the expense of public accountability. Binding arbitration is likely to result in the arbitration of public policy issues which the private neutral is ill-equipped to handle. The decision of the private

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168 *See id.*

169 *See* 42 U.S.C. § 7401 *et seq.* (1994) (establishing, among other things, permissible pollutant discharge levels).

170 *See generally* Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

neutral, therefore, will not always correspond to public values. Expansion of the confidentiality of ADR communications created by the FOIA exemption also reduces accountability by concealing communications that would otherwise be public record. While these changes may be a step forward for ADR in agency adjudications, they are likely to represent two steps back in terms of providing public access and accountability in government.